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Gamer Technology Conference—Emerging Business and Legal Issues in Video Games

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GAMER TECHNOLOGY CONFERENCE

Liam Lavery, Moderator
Richard Rhode, Moderator
Gail Markels, Panelist
Deanne Maynard, Panelist
Paul Lawrence, Panelist

On March 11 and 12, 2004, Law Seminars International (LSI) presented a conference on gamer technology, discussing emerging business and legal issues in video games.¹ The following is an edited version of the transcript from one of the conference panels² and following discussion focusing on trends in regulating and litigating video game content and access.

MR. LAVERY: Thank you very much for coming. It is a pleasure to be involved in this event and certainly to work with clients in the gaming industry. To some degree, attorneys live vicariously through their clients. A lot of what we find interesting and exciting about our work is interesting and exciting projects with the clients. And the game industry definitely offers that—very creative clients, fascinating projects to work on, and I hope that's part of what brought you here to this conference. As CLEs go, hopefully this one will be fun and fascinating as well.

The gaming industry has really taken off in recent years, and of course has become much, much more prominent in media, in culture, and financially. It's a multi-billion dollar industry, now rivaling other parts of

1. More information about LSI and its conferences can be found at <http://www.lawseminars.com>

2. The panel's participants included:
Liam Lavery, Moderator: Program Co-Chair; Partner, Preston Gates & Ellis LLP.
Richard Rhode, Moderator: Program Co-Chair; Partner, Perkins Coie LLP.
Gail Markels, Panelist: Senior Vice President and General Counsel, Entertainment Software Association.
Deanne Maynard, Panelist: At the time of the conference, Ms. Maynard was a partner at Jenner & Block in Washington, DC. She currently is an Assistant to the Solicitor General at the United States Department of Justice. The views expressed in this article do not necessarily represent the views of the Department of Justice or the United States, or of Ms. Maynard's former firm or its clients.
Paul Lawrence, Panelist: Partner, Preston Gates & Ellis LLP.

the entertainment industry for the entertainment dollar. The largest projects in gaming are reaching tens of millions of dollars in development costs. I think the press reported that *Enter the Matrix*, the game tie-in with the movie last year, cost about twenty-five million dollars just to develop, let alone marketing and distribution. But with that success and prominence comes a great deal of blame and responsibility as well, which we'll be looking at over the next couple of days. Games are being blamed for the moral decay of our youth. You may have heard of lawsuits around the high school shootings about whether those kids were playing games that encouraged them to learn how to shoot up their high schools. Games are being heralded for the revival of the computer hardware industry. We keep waiting for the launch of *Doom 3* and *Half-Life 2* and these other games that are supposed to sort of bring back the entire consumer computer business. And finally, it's the rivalry with the other parts of the entertainment business that continues to develop in terms of technology, in terms of creative origination, and in terms of the end-use of the dollar.

So over the next few days we're going to take a close look at these broad themes and the responsibilities and opportunities facing the computer gaming industry. I don't want to take too much of your time here before we get started. I'll pass it over to my co-chair here, Dick, and he'll give a brief overview of the events in the next couple of days. Thanks again for coming.

MR. ROHDE: Thank you, Liam. Welcome. I'm glad everybody had an opportunity to arrive today. And since we don't have the materials right at hand, we'll focus everybody's attention on our first panel here. I think we've been able to assemble for you here, over the course of the next few days, just a fabulous group of people, and we truly consider this to be a national program. We have speakers coming in from Los Angeles, Washington D.C., Texas, as well as a few of our homegrown folks from the Pacific Northwest. So I think we've done a good job in pulling together a group of people that you'll enjoy who will also be very informative and are leaders in their field.

Over the course of the next couple of days, we're going to try to lay out for you a number of the current topics that we've encountered in the gaming industry these days, everything from trends to regulation. As we move later into the program, we're going to be getting into some of the business issues such as the convergences that we're seeing with technology and entertainment and all of the industries that seem to be coming together. I know over the course of my career, I've seen it out with multimedia being sort of the first type of convergence. But lately, with the speed and acceleration of technologies such as content and platforms and telephones and

TVs coming together all at one time, this has become an extremely exciting and challenging time for lawyers. And, hopefully, when we get done with this program, you'll be up to speed, at least on current issues. So, you will be able to go out and deal with some of these issues that I'm sure you're going to encounter, if you haven't already.

We're going to start off today talking about trends in regulating video game content and access and also trends in litigating video game content and access. We've got a panel of folks here today that will deal with those two topics together. First, we've got Paul Lawrence. Paul is a partner at the Preston, Gates and Ellis firm here in Seattle. His practice focuses on complex appellate and civil litigation. He's got a broad range of public and private clients and is a frequent CLE speaker and published author. I think you'll enjoy Paul very much. We also have Gail Markels, who is at IDSA, the Interactive Digital Software Association [now known as the Entertainment Software Association]. Gail is Senior Vice President and General Counsel for the IDSA, where she is responsible for managing all of the legal issues affecting the organization, as well as public policy issues. Prior to joining IDSA in 1994, she was Vice President of State Government Affairs for the Motion Picture Association and General Counsel for the film industry's rating system. She's served as an Assistant D.A. for Kings County, New York. And finally we have Deanne Maynard, who's from the Washington D.C. office of Jenner and Block. Thank you for traveling out to join us here today, Deanne.

MS. MAYNARD: My pleasure.

MR. ROHDE: And she's, as I said, a partner in Jenner and Block's D.C. office, and she's a member of the firm's Media and First Amendment Practice and Appellate and Supreme Court Practice groups. She has significant experience dealing with media-related First Amendment practice and has been involved in a number of key cases in this area. And with that, I would like to turn it over to our panel and let them take off from there.

MS. MARKELS: Sure, thank you. My name is Gail Markels and I'm here on behalf of the video game industry, and I'd like to thank you. It's a pleasure for us to be here. I'd like to start our discussion and show a brief video tape which was created by a group called the Mothers Against Violence in America, which is a Washington State-based group. It's my understanding that this tape was shown extensively in Washington State, both last year to justify the passage of the Washington minor video game law,³ as well as this year, with respect to other legislation. This tape is also

3. WASH. REV. CODE ANN. § 9.91.180 (West Supp. 2004) (previously identified as H.R. No. 1009, 58th Leg., Reg. Sess. (2003)).

being shown in Sacramento, California, to support the passage of two bills and is being sent around the country to other legislators to encourage their own production of legislation. Can we show the tape?

(VIDEO TAPE PLAYS)

MS. MARKELS: From my perspective, the violence depicted on the tape you've seen is no worse, and probably is much less, than you can see in movies such as *Pulp Fiction*, *Kill Bill* or even Mel Gibson's *The Passion of the Christ*, where the headline is shock and violence. Should we take our kids? But having said that, as a parent, I think the decision is mine as to what my thirteen-year-old son sees both in the theater or at home in video games. Really, who wants me to sit here and knock the government? And quite frankly, we have many serious debates in my home as to whether it's appropriate for him to see Eminem in the theaters or whether I'm going to bring a copy home of *Postal* or *Vice City*. As a parent I make the decisions and I think I'm in a far better position than the government to decide what's appropriate in my home. It's not always easy. For those of you who are parents, I'm sure you know it's not easy to say "no," but that's sometimes what you all have to do. And again, I think the power belongs to the parents and not the government. I will say that it's a pleasure to be here again, and it's nice to speak to a friendly audience during a legislative session. As you can imagine, the reception we get can be sometimes tough as we debate over video game violence. It can be acrimonious. A few years ago when I approached the podium at a hearing of the Judiciary Committee, a young lawyer announced that he hoped that I wasn't going to waste the committee's time telling them that video game violence didn't result in violent behavior. Again, this was not the friendliest of welcomes, and to be honest with you, not a typical welcome at the state and local level.

Despite our industry's victories in places like Indianapolis, St. Louis, and Washington State, which Paul Lawrence and Deanne Maynard will address, it's an exceedingly busy year for our industry where we face forty-five bills at the state and local level. Twenty-two of these pieces of legislation are carryovers from the last session, and twenty-three are new. In fact, the number of bills that would attempt to regulate the content of games has increased dramatically over the past three years, with eight in 1996, eighteen in the year 2000, twenty-seven in 2002, and forty-five this year, which is an all-time high for our industry. In addition to bills pending at the state level, we are also closely watching the local level with ordinances pending in North Miami Beach and five measures in New York City, where a hearing is scheduled for March 30th, in just a couple of weeks. City council politics can present a challenge as a process can move quickly and a bill

can become law in just two weeks. In North Miami Beach, Florida, uproar over the phrase “kill the Haitians” in the game *Vice City* resulted in the introduction of a video game bill. And with that city council’s Haitian majority, the bill passed on first reading. The City Attorney, who understands the constitutional issues involved in that type of regulation, has recommended that the bill be put on hold until the court rules in Washington State, and there’s some additional law on the subject matter.

One fact that’s kept the interest level in media games high this year is that this is, in fact, an election year, and the bills that attempt to regulate the video game industry get a tremendous amount of publicity. I have an article⁴ with me today that I can hand out from *USA Today*, which talks about legislation in California, in Washington, in Florida, and this is a free source of publicity. I don’t think I’ve ever appeared at a hearing where cameras weren’t present or the media wasn’t present—both the written media and the televised media. As long as the issue continues to generate a tremendous amount of publicity, I believe we will continue to see bills introduced all over the country.

A second factor which seems to contribute to game legislation is that new media is treated with suspicion by legislators. Each new medium, whether it’s detective novels back in the forties, motion pictures in theaters, motion pictures on video cassettes, trading cards, or the Internet, has had to fight to be held as protected speech. And in fact, most legislators are forty, fifty, and sixty-year-olds, so they are not comfortable with video games. Their staffers, on the other hand—I’ve never spoken to a legislative staffer who wasn’t a game player. And we talked to legislators who explained that the average age for game players is twenty-nine, where the overwhelming majority of games already are rated “E for everyone,” and that only ten to twelve percent are rated “M for mature.” Quite frankly, they were surprised.

But the notion that new media creates a feeling of suspicion isn’t myth, it’s quite commonplace. Motion pictures, in fact, weren’t held to be protected speech until the early 1950s. And prior to that, there were rating boards, both at the state and local level that regulated what content could be placed in motion pictures. So I think that the legislators in a sense get confused. They think of video games as a delivery system, not as a source of content. And I think they would tell us all they wouldn’t begin to regulate the content of a motion picture, but they have no problem with regulating the content of video games. Again, it’s a new medium, and it’s going to

4. Larry Copeland, *Battle Over Violent Video Games Heating Up*, USA TODAY, Jan. 29, 2004, at 3A.

take a while for that consciousness to change, despite the fact that our industry has found in recent cases in Indianapolis and St. Louis that games are protected speech.

The number of bills in place is increasing, not decreasing. And why does that happen? Advisors continue to argue about old cases from the 1960s and 70s when games were unprotected. And also, I think many of our advisors fundamentally believe that they want to create new law and change the constitutional protections. And I think that's sort of what the basis of some of this legislation is. Unfortunately, we believe that efforts to regulate our industry are likely to continue. A number of legislators and activists are convinced that video and computer games are harmful and that with the right amount of tweaking a court will see it their way and will change the body of law.

The media and our industry are very concerned about the well-being of children, and we're proud that the FTC [Federal Trade Commission] has called our rating system, the Entertainment Software Rating Board, [ESRB] an industry model and the most comprehensive rating system in the country. At the ESA, [Entertainment Software Association] we support industry self-regulation. We believe that retailers should enforce the rating system at the point of sale and we work very closely with them to do so. Again, we believe that the industry could do a better job of development in that area.

I've reviewed the research that has been cited in support of regulation, which primarily consists of a small number of poorly constructed studies and weak correlations between games and violence. The most well-known of the researchers is Craig Anderson [a professor at Iowa State University]. He uses a length of "noise blasts," or how quickly one responds to seeing an aggressive word on the screen, to measure aggressive behavior. Quite frankly, I don't see the connection between that and violence and neither have the courts. Nor does the research community speak with one voice. A recent brief submitted by thirty-three media scholars in support of the ESA in St. Louis questions the research and finds no adverse effects. Initial research conducted by the government of Australia, by the State of Washington itself, and researchers like John, again, does not find a connection between aggressive behavior and the media or video games.

Moreover, as a former assistant district attorney, I look to groups like the Secret Service, the F.B.I., the Surgeon General, and the National Association of Attorneys General, who all looked at issues such as school violence. And in their reviews of school violence, they said that issues such as bullying, dysfunctional families, and access to guns and drugs are factors in school violence, not the media itself. I thought I'd share with you an ex-

ample of a community fairly close to my home about the issue of school violence. About two weeks before Columbine, my twelve-year-old daughter came to me and said that there's a girl in her seventh grade class who came from the Soviet Union, who smoked a lot of marijuana and did a lot of acid. Now, my daughter had me after "smoked a lot of marijuana and did a lot of acid," but that wasn't the end of it. She continued by saying that the girl didn't have any friends and that she had said that she was going to get a gun and shoot all the JAPS, referring to Jewish American Princesses. Now, we try to keep an open dialog in my home, and it was a gift that my daughter came and shared that with me. But of course, as soon as I started to ask further questions, as many of you who are parents know, I got very little else from my daughter other than the fact that she was concerned and that she thought the girl could act out.

The next day I called the school principal and shared with him what my daughter had said. And as a result the school brings the psychologists, the social workers, and the police in. Hopefully the girl got the help that she so clearly needed. Would the girl actually take out the gun? Would she have had access to one if the school hadn't intervened? We'll never know. But I can tell you that if there had been an act of violence at the school, people might have pointed to the media instead of the underlying factors that made that girl unhappy. And that's just one of the dozen stories that happen all over the country.

We don't know what causes school violence, but we do know that many of the kids are just tremendously unhappy and that a variety of factors contribute to these unfortunate incidents. While the overwhelming majority of bills target video games alone, other members of the content community, whether it's representatives from the movie industry, the record industry, or books and magazines, are also very concerned. They recognize that the constitutional protections for video games are weakening and that they are likely to be next. We work closely with them and we've spoken a little bit about the political environment that generates the interest in legislation.

I'd like to turn to the actual kinds of bills we are facing at the state and local level, and Deanne will talk about the underlying legal theories later, as to what issues these bills raise. But I thought it would be interesting or just helpful to talk about some of the bills that we're facing. The first topic of legislation that we've seen extends the state's "harmful to minors" law by expanding the definition of "harmful to minors" to include violent video games, but not other media. "Harmful to minors" laws traditionally restrict a minor's access to sexually explicit materials, and in general, have been upheld by the courts. This type of regulation would gener-

ally substitute the word "violent" for "sexually explicit" in the three-tier "harmful to minors" test. Legislation to expand the definition of "harmful to minors" to include violent games is under consideration in two states this year.

The second type of legislation prohibits the minor's access to video and computer games that contain depictions of violence. Currently, violence bills are pending in eleven states and municipalities. "Minors" are defined as persons under the age of eighteen years, and these bills prohibit a minor's access to games that contain specific depictions of violence. One fairly expansive definition in one state would prohibit the sale or rental to minors of games that contain depictions glamorizing or advocating commission of a crime, suicide, sodomy, rape, incest, bestiality, sadomasochism, or any form of sexual activity in a violent context, advocating or encouraging murder, violent racism, religious violence, morbid violence, or the illegal use of drugs or alcohol. Again, this is a very broad definition of violence. Other state bills prohibit the distribution of video games containing an act of violence, which is defined as a depiction of serious injury to human beings, true or virtual, aggravated assault, decapitation, dismemberment, or death. One variation prohibits the minor's access to games containing violent depictions unless parental consent is provided.

The third category of legislation prohibits the minor's access to games that have been rated "M for mature" or "AO for adults only" by the Entertainment Software Rating Board. When similar legislatures adopted the requirement of enforcement of the MPAA ratings in the 1970s and 80s, the courts had uniformly declared such kind of regulation to be unconstitutional primarily on due process grounds. These bills, which require the enforcement of ESRB ratings at the point of sale, are being considered in eight states or municipalities. Several states also are considering proposals that are mandating display of ESRB ratings on video games as well as displays of the rating at stores themselves. One state is presenting a bill that prohibits persons under seventeen from possessing, buying, or renting M- or AO-rated games.

The fourth category of regulation, which surfaced this year, requires a retailer to segregate either M or AO-rated games based on their rating. This regulation, for example, would mandate that M-rated games be placed at a height of no less than five feet and that AO-rated games be segregated in a separate area, generally in a separate room. Now, aside from the significant constitutional questions that these bills raise because they're basing the regulation on a private rating system, they would also require that stores retrofit their facilities, which is simply not possible in most cases. Segregation bills are pending in five states and municipalities. And in this area our

legislators seem to equate video games with spray paint or box cutters and don't understand why it's okay to require that spray paint be kept in a locked cabinet and not video games. Again, they don't understand that video games contain content and, therefore, they can't be treated the same way you treat a screwdriver. But we just have our work cut out for us.

ESA's position with respect to video game regulation is that video games are protected speech and that attempts to regulate video games must follow constitutional standards. And while we support retailer enforcement of the rating system—which is, in fact, the cornerstone of our rating system—we believe that it should be done on a voluntary basis as it is done in the film recording industries. We work closely with the retail community, both on a one-on-one basis and through their trade associations: the Interactive Entertainment Merchants Association [“IEMA”], which sells through retailers at Wal-Mart or K-Mart; and the Video Software Dealers Association [“VSDA”], which sells through video rental operations like Hollywood Video, Blockbuster, and Movie Gallery. And I think we're going to get there. I think the retailers understand the importance of rating compliance. But even in an industry like the film industry, which has been around for forty years, until this year they had difficulty breaking the fifty percent rating enforcement barrier. When you look at stores like K-Mart, Wal-Mart, and Target, you have a sixteen-year-old clerk who is responsible for two or three thousand different SKUs, so when there's a backup in the line, even if the cash register prompt says, “Check ID,” a sixteen-year-old may not follow up. We are working with the retailers to make sure they understand how critical and how important enforcement is. And based on the latest sting done by the National Institute on Media and the Family, which is really an important industry critic, found that with stores that have an enforcement policy in place, retail compliance was seventy percent, which is extraordinary. And the numbers don't always come in at that level, but that's an area of growth for us that we are looking at very closely.

The IEMA adopted a policy this year in which their members agreed to institute a national carding program and implement an identification check process at the point of sale, effective Christmas 2004. But in fact, twelve of the fourteen IEMA members already had that protocol in place and are following suit. The VSDA has followed retailer enforcement since 1994. In those cases, when you go to a Blockbuster or a Hollywood Video and you become a member, which you have to do, they ask questions like: “Would you like to impose any restrictions on your children?” And at that point you have an opportunity to say: “No R-rated movies for Johnny. No M-rated games for Mary.” That's where the parent has the opportunity to impose restrictions they choose.

From a legislative perspective, our goal is to be treated the way motion pictures, newspapers, books, and magazines are treated under the law, and with the same protections. One alternative type of legislation suggested by ESA is to include video computer games in existing court-approved "harmful to minor" statutes. They prohibit distribution of materials such as motion pictures, books, and magazines that depict explicit sexual activity in accordance with the three-tier obscenity test, which is in place in at least forty or forty-five states. Oklahoma has adopted this kind of regulation in the last couple of years.

Let's turn to the home state we're in now, Washington State, which has considered a variety of different types of legislation to regulate the video game industry. Most recently, Washington State has considered a program to monitor retailers' enforcement of the ESRB rating system and then issue a report on the results to the public and legislature. This bill failed to pass committee and is pending. This session in Washington State also heard a resolution urging the ban on advertising of violent video games that are rated "AO" or "Mature." And again, as you know, Washington State last year did adopt a prohibition against the sale or rental of violent video games to minors. Now I'm going to turn over the podium to Deanne, and if you have any questions I'll be happy to answer them at the end of the conference.

MS. MAYNARD: Thanks, Gail. My name is Deanne Maynard. I'm a Partner at Jenner and Block in Washington D.C. And I currently represent Gail's association, as well as the other plaintiffs, who are challenging the Washington State statute that is attempting to regulate minors' access to certain video games. And I've also represented the industry in a successful challenge to a St. Louis County ordinance that was similar to the one here.⁵ And I've also successfully defended a number of video game companies in suits that followed after-school shootings in Kentucky,⁶ and the Columbine School shooting in which plaintiffs tried to impose tort strict liability on media content providers, claiming that their media had somehow caused the actions of the students there.⁷

I am going to address the general legal issues raised by laws of the type that Gail has described that attempt to regulate violent content. And I'm going to limit my comments to the general theories on the general problems in the cases I have previously recited, and in a way such that I don't comment specifically on the current ongoing Washington State litiga-

5. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003).

6. *See James v. Meow Media Inc.*, 300 F.3d 683 (6th Cir. 2002).

7. *See Sanders v. Acclaim Entm't, Inc.*, 188 F.Supp.2d 1264 (D. Colo. 2002).

tion. And Paul, who is here in Washington State, is going to talk about specifics of what's going on in that litigation now. But the first question that courts face, or have faced, in litigation challenging laws regulating access to video games based on their content, is a claim by the government that video games aren't speech protected by the First Amendment. And as Gail indicated, this is a claim that courts face whenever a relatively new medium of expression comes into existence. As Gail mentioned, with movies, the Supreme Court initially got it wrong. They initially said that movies were not protected speech, but later reversed themselves. And certainly today no one would think that movies aren't protected artistic expression.

Similarly, I helped litigate the Communications Decency Act case, the first case involving what level of scrutiny applies to the Internet.⁸ That was a serious debate with the trial court and the Supreme Court in that case about whether free speech on the Internet should receive full First Amendment protection.⁹ But one thing is clear now in the law, which is the fact that just because you're a new medium of expression does not mean that you get a lesser degree of First Amendment scrutiny. The fact that you may be mere entertainment and that you may not have a political or ideological message, does not deprive you of First Amendment protection for your speech. The Supreme Court has used examples like the "Jabberwocky" verse by Lewis Carroll¹⁰ and paintings by Jackson Pollock are protected, to show that even though there may be no articulable message contained in your art or in your expression,¹¹ it doesn't mean that you don't get First Amendment protection. It also does not matter that you sell your speech for a profit. The court made that really clear both in the movie context and in the newspaper context. Most newspapers are sold for profits. And certainly no one would contend that the *New York Times* is not protected speech.

In the context of video games, as most of you are either in the industry or involved in representing the industry, you all may be the group that's most inclined to think that video games are protected speech. I think it's clear that video games are a combination of lots of other protected things we consider to be protected speech; [such as] art [and] music. Some of the best musical composers today are recording songs for video games. The best graphic artists today are involved in developing video games. The

8. *Reno v. ACLU*, 521 U.S. 844, 858 n.24 (1997).

9. *Id.* at 885.

10. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995).

11. *Id.*

artwork in video games is every bit as detailed and intricate as the artwork in the most modern animated film. The storyline of games, the character development, the types of themes that are in games, mirror those in books and mainstream movies. Good versus evil, triumph over adversity, all the kinds of things that you see in television programs and movies and classic literature. So courts have recognized that, with one exception. A district court judge in St. Louis,¹² I think, made the same mistake that the Supreme Court initially made with respect to movies and held that video games were not protected speech. And the Eighth Circuit predominantly reversed this decision and recognized that video games were as protected, as the best of literature, for the reasons that I've said.

The courts have also rejected the notion that the interactive nature of video games somehow makes them less protected speech. Judge Posner, in a Seventh Circuit case¹³ involving an Indianapolis ordinance, said that all great literature is interactive. The purpose of a new great book is to draw you into the story and make you identify with the characters in the same way that the purpose of a movie is to do that as well. The Eighth Circuit¹⁴ used an example of the pre-teen book series called *Choose Your Own Nightmare*, where if you followed the instructions at the bottom of the page and made choices, the story comes out differently. And that's similar to video games where you become a character and the reaction and choices that you make may determine the ending. Your participation ends up in the action in the same way as when you get caught up in a book and you are identifying with a character in a book. So, every court that's reached the issue has held that for these reasons, attempts to regulate video games, either through tort law or through legislation based on the supposed communicative impact of a game, are attempting to regulate speech—and that triggers First Amendment scrutiny.

MR. LAWRENCE: Thank you. My name is Paul Lawrence, for people who have forgotten. In addition to being a litigation partner at Preston, Gates and Ellis, I'm also on the National Board of the ACLU and the Washington State Board of the ACLU. So, my perspective is also that of the ACLU. I think we tried to get the representative in Washington who sponsored the bill so there might be another side presented; unfortunately, he was not able to attend today. So I apologize that there aren't more speakers up here. The basic points that Deanne pointed out are issues that

12. *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

13. *See Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

14. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957-58 (8th Cir. 2003).

are coming up in the Washington case, though I think it is probably fair to say that the State of Washington, to its credit, is not making a very whole-hearted attempt to argue that video games are not somehow falling in the general category of speech. I think there are a couple issues that we'll probably get to in a second that are a more serious effort on their part.

The first issue that the court always has to address is whether this speech is something that can fall within the protections of the First Amendment. And as Deanne pointed out, there's been uniform case law so it's kind of hard to argue that it's not because of various elements that are at play. The status of the Washington case is that the federal court lawsuit was filed and the federal court judge has issued a preliminary injunction that basically is stopping enforcement of the lawsuit. So we have the benefit of that order.¹⁵ And in that order, the judge directly deals with this question and really pretty quickly dismisses the notion that video games are not protected by the First Amendment, and specifically notes that what's at issue here is the supposed violent message of video games. That almost tells me inclusively that what's being regulated here is the supposed message or the point of view, and anything that has a message or point of view clearly falls within the First Amendment protection. So the notion that you can come and try to regulate because of the violent message or the violence associated with the video game, then still argue that there's no point and no message, is simply not something that any court's going to fall for.

MS. MAYNARD: And once you decide that the First Amendment is clear and that the statute is regulating based on the content—and as a matter of fact, Paul described exactly what content, for those of you that don't know, that the Washington statute is attempting to regulate, basically, the statute regulates a subset of violent content—then the state concedes that it is regulating on the basis of the specific content, and so, the statute is content-based. For those who remember their constitutional law, content-based regulation triggers strict scrutiny in the First Amendment analysis, which is the toughest form of judicial review for a governmental body to overcome. And content based regulations—that is, regulations that try to regulate what you can say based on what it is you intend to say—are presumptively unconstitutional and pose a huge burden for a government to try to withstand a constitutional challenge. Just to refresh your recollections from your first or second year of constitutional law, strict scrutiny requires that the government prove a compelling state interest in the regulation, and that the in-

15. Since this panel, the Washington statute has been stuck down as (1) violating the First Amendment under strict scrutiny, and (2) as unconstitutionally vague. *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180, 1190-91 (W.D. Wash. 2004).

terest that it seeks to vindicate is not only compelling but is also real and actual. It can't be supposed. You have to actually prove that there's actual harm, and then they have to prove that the regulation that they've put forth is going to materially and directly alleviate that harm. So the regulation has to be narrowly tailored to compelling interests that they seek to serve. In addition, there has to be no less restrictive alternative than the means that they have chosen.

In the case where government is trying to regulate violent speech on the grounds that it thinks that the listener is going to react violently or it's going to cause a listener to become violent, the Supreme Court has announced a test to decide whether or not the government can regulate that arena, and it's in a case called *Brandenburg*.¹⁶ It sets forth three specific prongs that the government must meet to withstand strict scrutiny. The speech has to be directed to and likely to create imminent lawless action. So in the context of any kind of recorded medium, or a television show, or a movie or a book, it's hard to fathom how that test could really ever be met. The courts made clear that pamphlets advocating a revolution are not enough. And in courts addressing video games specifically, that there's absolutely no evidence that video games, which are designed primarily to entertain, are directed to causing any lawless action. And to my knowledge, no government has ever claimed that it is the intent of video game makers.

Secondly, the kind of imminent action that's required to satisfy *Brandenburg* can't be met in the video game context either. As Judge Boggs put it in the St. Louis case for the Eighth Circuit,¹⁷ he said that the palatial process of personality development, that's at issue, is what the states are concerned with. You know, the kinds of messages that our kids receive or that we receive, and the impact that that may ultimately have on our view system and our morals and what we think is right, is far from the imminence required by and announced in *Brandenburg*. And finally, it has to be likely that this imminent lawless action is actually going to occur. Millions of people play these games every day, and it's hard to see how the government could ever put a standard in the context of something that's consumed by millions without incident. But basically, if one were to allow the idiosyncratic reactions of a few to determine what we're all entitled to be, see, and hear, that's basically going to lower the level of public discourse to the lowest common denominator, and that can't be the standard by which we're all forced to live.

MR. LAWRENCE: We're going to sort of shift a little bit to talk

16. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

17. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003).

about the notion of violence and how it plays into the First Amendment analysis there, as Deanne was discussing. As you heard, the bills that are coming up across the various state legislatures have focused on the concept of violence. And, in fact, the Washington State law is focused also on—I guess I can say—a subset of that violent issue on video games. The state law that was passed defined a violent video or computer game as a video or computer game that contains realistic or photographic-like depictions of aggressive conflict in which the player kills, injures, or otherwise causes physical harm to a human form in the game who's depicted by dress or other recognizable symbols as a public law enforcement officer.¹⁸ You can kill undercover cops, that's not a problem. But if they're in uniform, then it's not exactly clear.

But this law, as well as others, addresses violence. So one of the questions that has come up in the Washington case, and has come up in all these cases, is where does violence fall within the First Amendment? You understand that there's this notion of obscenity out there and that obscenity is a type of speech that is not going to be subject to First Amendment protections. And the case law today suggests fairly clearly that obscenity is limited to sort of a sexual-based type of regulation, and that it doesn't extend to violence. This has nothing to do with what should be argued in a case, frankly, but personally, I don't know why that distinction exists; why sex can be regulated by obscenity. I don't think anything should be regulated by obscenity and I don't know why sex as a moral outrage is something that you regulate but violence isn't. But that's the line that's drawn now. So any one of the main attacks that you find in the Washington case, as well as these other cases, is trying to expand the notion of obscenity to include the same types of extreme depictions of violence that, of course, look as obscene when you see extreme depictions of sexual activity.

So, I think on some level, that notion of whether or not the contents of obscenity should be expanded is probably the most interesting legal issue that you're going to face, and it's harder to justify the line that's been drawn by the courts. Again, my perspective is that there shouldn't be any line drawn by the courts and they shouldn't have a category excluded to begin with. But the line between violence and sex is something that's being taken head-on in the Washington case in saying: look, this doesn't make any sense to have us find the cases that have talked about that, relying on dicta or non-binding holdings of the U.S. Supreme Court. And so I think you'll see continual attacks until the U.S. Supreme Court again revisits this issue—which they may never—about kind of expanding the notion

18. WASH. REV. CODE ANN. § 9.91.180 (2004).

of obscenity to include this, I guess, conflict about the killing of a police officer in a video game.

MS. MARKELS: If I could just interject for a moment. That does come up when you talk to legislators in different states. You see some of the legislators who introduce bills seeing themselves arguing this case before the Supreme Court time and time again. And it's probably up to the State Attorney General in your state to argue against that for you. But I think there is that feeling that people do want to make new law, and they want to pass a law that pushes against the Supreme Court.

MS. MAYNARD: I think it is true that the Supreme Court has made it quite clear that the definition of obscenity is limited to sexual erotic speech. And they said that recently in the *ACLU v. Reno* case,¹⁹ where they said that the definition of obscenity, made quite clear in *Miller*,²⁰ is limited to sexual speech. And courts across the country have so held in both the video game and related context. For example, the Second Circuit did so in a case involving trading cards, and the Eighth Circuit did so in a case both involving rental movies as well as video games. I think, again, as Paul says, if anything, it suggests that the obscenity case law is mistaken.

MR. LAWRENCE: It's a silly distinction. You could probably spend a whole other hour talking about obscenity, but it is something that I think is a clear target in the Washington case.²¹ The other couple of sort of broader First Amendment issues are—there was a suggestion in a footnote, and it doesn't appear to be followed through by the state—the notion of fighting words, in the *Chaplinsky*²² case, where at some point you're about to get into a fight with somebody and you use certain words that are deemed "fighting words." Again, that's another category of words that is so worthless that it doesn't fall within the notion of the First Amendment protection. The judge in the Washington case actually put a footnote in his decision that said nobody's really raised this issue of fighting words.²³ But I would read into it that upon his seeing—and he had viewed some of these video games, including the ones that you saw here as part of his review on this matter—and I guess he thought, at least, that one could argue that *Postal 2* might fall into the fighting words category, but it doesn't seem to be something that's going to be head-on addressed anyway. But it was an interesting footnote that he put in his decision granting a preliminary injunction. But again, nobody argued that point. I think this was his obser-

19. See *Reno v. ACLU*, 521 U.S. 844, 884-85 (1997).

20. *Miller v. California*, 413 U.S. 15, 24 (1973).

21. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (2004).

22. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

23. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1187 n.3 (2004).

vation that maybe *Postal 2* was akin to fighting words.

Another interesting argument is out there. The last notion that you get from the First Amendment doctrine is what you can do to protect children. These are all laws that are aimed at sale to minors. And again, as those who are lawyers remember from your constitutional law class, that, with respect to obscenity, there's a category of obscenity that is obscene as to minors but may not be obscene as to adults. So there is some precedent, again, if you can try to grab onto the obscenity doctrine for the states. And there are other circumstances too where the rights you have as kids—you clearly have First Amendment rights as children—they are not the same full standard rights that you have as an adult. And one example is the obscenity standard as to minors. Another example is actually a case out of Washington State dealing with what you can say at a school speech.²⁴ A kid running for office had a lot of sexual innuendo in his speech and was disciplined for that. The Supreme Court, much to my chagrin, and then probably to everybody else at this table, decided that it was okay for school discipline purposes to discipline this kid for speaking clearly in a way that, if an adult had spoke, he probably wouldn't have been elected, but at least the adult would not have been punished either. So there is some precedent for the notion that the state can act with respect to the speech rights of kids in a different way than with adults.

MS. MAYNARD: And courts again, including in the video game context, have rejected extending the harmfulness to minors obscenity doctrine for children into the context of violent speech regulation, both for the reasons that Paul says, which is that because *Ginsberg*²⁵ is an outgrowth of the obscenity doctrine and there's no comparable unprotected speech with respect to violence. The Supreme Court has held violent speech is fully protected in the *Winters* case.²⁶ The courts, including the Eighth Circuit in the St. Louis case,²⁷ specifically rejected the county's attempt to rely on the *Ginsberg* case. In particular, the court noted that there is simply no limiting principle to the government's argument that it can decide what's best for our kids, or what would a parent then decide in what's best for their children, and pass laws to create that as the speech that's available to kids. Because as Paul says, the Supreme Court has been really clear that children have First Amendment rights, and these laws regulate a wide range of kid's rights. We're not talking about simply really young children; we're also

24. *Fraser v. Bethel Sch. Dist.*, 755 F.2d 1356 (9th Cir. 1985).

25. *Ginsberg v. New York*, 390 U.S. 629 (1968).

26. *Winters v. New York*, 333 U.S. 507 (1948).

27. See *Interactive Digital Software Ass'n*, 329 F.3d at 959.

talking about full teenagers. And as Gail points out with her thirteen-year-old, different kids have different maturity levels, so parents should be able to decide, and that's where the real conflict exists. The government shouldn't be telling us what our kids can see or not see. The rationale for extending *Ginsberg* beyond prurient speech has no limiting principle. Our law firm fought the banning of *Harry Potter* in a community because there was no ban on the way that it teaches witchcraft. So, if video games are just the first step, then the next question is: what else is the majority of the government going to decide is not good for our children? So it's really a slippery-slope rationale if you let *Ginsberg* out of the sexually explicit speech box.

MR. LAWRENCE: Which they should never have opened up, but we'll fight that.

MS. MAYNARD: It might make sense to move on to the narrowly tailored prong, because that comes up in the judge's order as well. As I said, I don't think the states can show a compelling state interest because of the test in *Brandenburg*. And even if they were able to show a compelling state interest sufficient to satisfy strict scrutiny, they'd have to show that the means by which they've chosen the regulation that they pick is going to alleviate the alleged harm in a material way, and also that they've chosen the least restrictive means. And this is an issue that's come up, including in the Washington litigation where the judge addressed this issue in his preliminary injunction order.

MR. LAWRENCE: That's a cue for me, that law and that order. So far we've talked about certainly that the first issue that the court dealt with is this protected speech. And so we've held that it was clearly protected speech, and then they said, as Deanne said, well, that's not the end of the issue. The state can regulate protected speech if there's a compelling state issue or interest, if it's done in a narrowly tailored way. So he addressed that notion. And we recognize that in certain circumstances, the state does have a legitimate compelling interest in safeguarding the physical and psychological well-being of minors. And if you go back and look to the act itself, there's some history there on the bill's support that led up what the state thought it was trying to do, or what compelling state interest they were trying to achieve. And what they decided is, again, what you have seen come up in the Washington case and other cases. First of all, this scientific "evidence" that Gail talked about that is supposedly linking exposure to violence to violent behavior, and most of it is, in a very general way. It's not specific in any sort of meaningful way to video games. And even if you give it whatever credence you give it, there are many, many factors that always come into play as to what leads to violent behavior, for

example, exposure to violence and all the family issues that Gail talked about around her own table.

But there is some body of evidence that the legislature in Washington, as well as other people in these cases, talk about in trying to show a link between exposure to violence and violent behavior. My son has a screensaver that he's downloaded from pennyarcade.com. He's sixteen-years old and he plays *Vice City* and such. It's funny, but this is actually kind of almost what you hear the people saying. The screensaver says, "Guns don't kill people. Kids who play video games kill people." But that's basically the argument that the state's making is that kids who play video games kill people and that's why we need to regulate video games. They also try to bring in the notions of parallelism to pornographic films. They actually said in the legislative history, like the porn film, the violent games don't have any plot—I don't know, but again, if you throw out obscenity, it makes them feel better about themselves. And then, there is the notion of it being interactive and participatory as part of the rationale.

Finally, we're protecting police officers. The big thing that a person in Washington was asserting: "Well, most cases in the Seventh and Eighth Circuits that found the descriptions unconstitutional, they were way too broad. Ours is here to protect police officers. And gosh darn, if we can't protect police officers, what can we do?" And of course they bring in a string of the police officers in to testify and say, "I have no doubt that this one police officer is going to be killed by some kid who was playing *Postal*. And if we can prevent that by taking away these video games, that's a worthwhile thing." So you see that argument. So the court looked at all these things in the Washington case and finally, at the end said: "Look, you have to demonstrate that these are real harms and not merely conjectural, and demonstrate that what you're doing will in fact alleviate these harms in a material way, and basically dismissed that very, very, very easily." He went through the studies that were presented to him and recognized that even if you give the studies credence, they don't show any link at all between video games and violence. They've got a more broad-based notion that exposure to violence, be it in movies or TV or anything on the street, leads to violence. Okay, well maybe there's something to that, but that in and of itself is not going to be a basis for doing that. And of course, one of the ironies, I think, as Gail talked about, is how the media loves these bills. And I think one of the reasons the media loves these bills is because it's giving them an excuse to play the video clips like we just saw on TV, which show violence. It probably helps their ratings, so it's a side operation. So the court went through the studies and the court said that even if you draw the inference that there may be some relationship to exposure

to violence and levels of aggression that are experienced, that that is not really related to video games. Then he goes on to say that, in addition, this idea of picking one little segment of the world that has anything to do with violence and restricting that, he called it an arbitrary decision to focus on video games. Even if you accept the concept that there's some arguable link between exposure to violence and aggression, to pick out video games, the regulation was arbitrary and it won't have any affect on all the other ways that people get exposed to violence. And so basically there's nothing to suggest it's going to have any actual impact on the alleged justification. So he actually went through and looked at the studies done before him and appropriately rejected them.

MS. MAYNARD: The final prong of the strict scrutiny test is whether the government has chosen the least restrictive alternative. And we have consistently argued in these cases that they have not, and that a far less speech-restrictive alternative would be to educate and make people more aware of the rating system that exists for video games, which is—I'm sure all of you are aware—akin to the movie rating system which is now just a part of the national consciousness. And that would be far less speech-restrictive, and would be deemed a means of empowering parents to make choices for their children based on their own family values and their own child's development, and what they think is appropriate for their child that is not speech restrictive at all. As Gail said, the ESRB does rate the games that are marketed, and the Supreme Court has made clear in a couple of cases that one can't assume that parents armed with information will fail to act, and that education efforts can be a less restrictive alternative.

MS. MARKELS: If I could just interject for a second. In fact, even our own research that we've done, the FTC's done, indicates that the overall majority of games are bought by parents, not by kids. Games are expensive. They're often sold from locations where my thirteen-year-old can't buy the games for himself, like Wal-Mart. Plus, he can't spend fifty dollars for a game. So the FTC's research says eighty percent. Our research says ninety percent of games are bought by parents. But irrespective of which research you choose to follow, every game that's played by the child, chances are the mom or dad got it for them. Again, as Deanne mentioned, we need to educate parents. We make great efforts to do so, but most games are bought by parents for their kids.

MR. LAWRENCE: I did buy *GTA Vice City* for my son. He didn't buy it for himself. You might sit there and ask yourselves: Okay, well, you've got three intelligent people up here and they're saying this is, like, crazy. It's so clearly unconstitutional, why is this happening? And I think the point of what Gail said, is that it is politics. And that's why it will be a

continual danger across the various states. The Washington law passed. Washington, for those of you who are not from Washington, has a House and a Senate side. In the House side it passed eighty-one to sixteen, and in the Senate side it passed forty-two to seven. These are quite overwhelming numbers, because that includes Democrats and Republicans joining to pass that thing. And you have to sit back and see the phenomenon. You show these types of things to a legislature, and each legislator has to decide: "Well, how am I going to vote on this?" And then you have a police officer who gets up there and says: "If you don't pass this law, one of my fellow officers is going to be dead, and how's that going to feel on your conscience?" And so there's a lot of politics. There's a lot of political pressure there. And the people who may not even believe it are scared to vote no because if they vote no then their opponent is going to run next time and say: "Senator so-and-so voted in favor to allow kids to buy these games and shoot police officers. Would you vote for a politician who wants kids to shoot police officers?" And that's a serious concern.

And to digress, about ten years ago, there was a state that passed an erotic-music law, which made it a crime to sell erotic music to minors. That bill actually, I think, passed even more overwhelmingly than this bill, and it was one of the things that Gail was talking about. It took about two weeks. Essentially, some seventeen-year-old thought it'd be funny to play 2 Live Crew for his four-year-old cousin. His four-year-old cousin heard it and asked a question to his mom about this reference to anatomy and a "cat," and why someone would want to do that to a cat. And she got on the phone and called up some legislator in Everett. The next day, he wrote up this law, it was on the books, and it just kind of blew right through. I think there were two people who voted against it in the Senate and maybe seven in the House. And it was signed into law before anyone even thought about it.

And again, it's just this political thing. Nobody wants to say: "Ah-ha, you're in favor of selling pornographic music to kids." No one wants to deal with that. And it was actually quite funny because afterwards, at the ACLU here, we got letters from about twenty legislators apologizing for their vote. "I'm sorry, I didn't really think about it." So, publicly they've got to vote yes, but privately, they're trying to say to the constituents: "Oh, now that we think about it, our vote was wrong." Nonetheless, you had to bring a lawsuit, and that law was struck down. That was actually one of the few ACLU cases where we won in the Washington court nine to nothing. So hopefully, this law will suffer the same fate.²⁸ But as Gail pointed out,

28. Since this panel, the Washington statute has been struck down as (1) violating the First

this is not a new phenomenon, in the sense of either a new medium or a new issue, like hip-hop or rap when it was first coming up, that it's easy political pickings and politicians jump all over it. What happened here will happen in other states.

MS. MAYNARD: And depending on your age, you may remember their attempts to ban your music or your comic books, or now video games. And as Judge Posner said in his opinion, we're dealing in the realm of kid's popular culture,²⁹ but it's not likely to be set aside. I still have one more ground on which it's unconstitutional.

MR. LAWRENCE: That's fine, but let's stick to that last point. One thing that Judge Posner said in his decision—which actually is a comment from the erotic music thing—is he referenced that to, I think, *The Odyssey* of classical literature and said: “Look, violence in literature is not new. *The Odyssey* was as violent as anything that you're telling me here. Maybe you're reading it rather than looking at it, but it's the same level of violence.”³⁰ And when I read that, it reminded me of a state supreme court argument about the erotic music bill. One of the justices turned to the State and said: “I just went to an opera last night, and it was all about incest and rape. Is that erotic music?” Really, it's hard to make the distinction because the themes of violence and sexuality are things that go back in classical literature and are throughout our history.

MS. MAYNARD: And in kids' popular culture as well. I mean, even as Judge Posner said, consider Grimm's Fairly Tales, especially the original versions. My daughter, who's two, has a copy of the original versions, and it's quite something. But a story that is similar to your story about the Washington Supreme Court, in the Eighth Circuit, Judge Riley turned to his colleagues on the bench and said: “This may surprise my esteemed colleagues, but as a child, I played cops and robbers and I killed many a person, and yet I've ended up as a federal judge.” So, I think a really good amount of perspective is needed on some of these things.

Despite all the elements that we've gone through, there's yet another reason why statutes of this nature are unconstitutional in my opinion, and that is that it's very difficult, when you're talking about proscribing content and speech, to define what it is that you're prohibiting in sufficiently precise terms to put a reasonable person on notice as to what it is that they're not supposed to do. And that presents due process issues. Unconstitutional

Amendment under strict scrutiny, and (2) as unconstitutionally vague. *Video Software Dealers Ass'n v. Maleng*, 325 F.Supp.2d 1180, 1190-1191 (W.D. Wash. 2004).

29. See *Am. Amusement Machine*, 244 F.3d at 578.

30. See *Am. Amusement Machine*, 244 F.3d at 577 (Mr. Lawrence paraphrased Judge Posner's actual statement.).

vagueness is a reason to strike a statute separate from the ground that we've already discussed. And this is one of the grounds that we've raised regarding the Washington State statute. But as Gail was saying in general terms, a lot of these games are being sold by clerks and people of that nature, and how are they supposed to be on notice about what it is they're supposed to sell and not sell and to whom?

MR. LAWRENCE: Yeah. As you remember, the Washington law bans depictions of aggressive conflict. Does anyone know what that means? If you are trying to create a video game in a "Washington law world" where you're trying to avoid violating the law, would you know what aggressive conflict means? Or—and this is part of the problem when you get into the constitutional test—would you have to, in order to protect yourself, screen so broadly to avoid anything that arguably could be aggressive conflict, that you basically then sort of do away with any ability to have sort of free speech rights? And one of the things that the court did note is that even if there's something in those video games, you're trying to just get at those thirty scenes that you saw out there on the screen, and the way that it's done is so broad that the law is going to cover a lot of other types of scenes in video games. I'm talking about video games, specifically about the video game that's a spin off of *Minority Report*, as an example, where the character is running away from the police. That's part of what the game is about and part of what the whole storyline is about; somebody dealing with a corrupt police force. So, in that context, the game is dealing with a corrupt police force and the players are being aggressively "conflictual" with the characters that are depicted as police officers.

Or another example my son pointed out when this law was passed, he said: "Do you remember the *Spider-Man* video game? There's a scene in *Spider-Man* that in order to go onto the next level, you have to actually kill a police officer." And maybe he did it in a non-aggressive way, but still, it's a kind of problem. Again, it's the same issues that come up a lot of times in other context, too, for instance, in erotic music. Again, nobody knew what erotic music was. Was that Frank Sinatra? In some ways, Frank Sinatra was probably more erotic than 2 Live Crew. And frankly, the only reason it works in obscenity is that the Supreme Court adopted this definition that to me doesn't make any sense. But because they adopted it, now every state statute has the same definition in it, and we all have to live with it in the obscenity area. But again, given the notion that it is aggressive conflict, I think they have similar problems in other lawsuits that we've spoken of.

MS. MAYNARD: Now, do you want to take questions?

MR. LAVERY: Yeah. Why don't we open it up to the audience and

you may jump in at any time.

AUDIENCE: Given the political dynamic that you were describing, and the fact that at least in one other context it has risen to the level of proposing constitutional amendments, are you at all worried as an industry that there might be proposals coming out with seemingly similar specific language to amend the U.S. Constitution?

MR. LAVERY: We might want to remind you that this is all being taped.

MS. MARKELS: I guess the question is, are there concerns that we may have similar legislation on a federal level. Joe Baca, a congressman from California, has introduced legislation prohibiting the sale or rental of violent games to minors, and that's something that's being watched very closely.

AUDIENCE: If the politicians are all running scared, what if somebody says: "Let's amend the United States Constitution to prohibit graphic person-on-person violence," or whatever. Do you view that as a risk at all?

MS. MARKELS: I don't. I think amending the Constitution is like a Herculean task, and naturally Paul and Deanne would agree. But I don't think that sentiment runs that strong.

MS. MAYNARD: I haven't heard anybody mention that, and I agree with Gail. It's such a large effort to amend the Constitution, rightfully so.

MR. LAWRENCE: Yeah, I do think that there's people who do realize that amending the Constitution is different from passing a law. And I don't think there's been any effort here. But if you wanted to try to draw a parallel that's more close to a speech issue, one could look at the business of flag burning in the eighties. So, within the twenty years since the Supreme Court said that flag burning was protected speech under the Constitution, there've been continual efforts to have an amendment specifically directed at flag burning. If there was going to be anything that was passed with respect to the free speech, that probably would be it.

MS. MAYNARD: To some degree—and I think maybe you were alluding to this, and I haven't heard anybody say that to me specifically with respect to other free speech issues—I think some politicians rely on the First Amendment to protect us from their politically expedient votes. So, I don't think that they would go the next step.

AUDIENCE: Do you think it's a problem that's going to have its day and pass, much like Ozzy Osbourne's super gore moment and when Metallica was being blamed for suicides? Or do you feel that this is just going to kind of plague the industry from here on out?

MS. MARKELS: The question is, do you think this is a problem that

will pass? Is it a topical problem or is it here to stay? And again, I think that until there are more resounding court decisions that say both that video games are protected speech and this type of regulation is impermissible, I think there will be some attention. But videocassettes in the 1980s were subject to similar regulations. I worked for the Motion Picture Association at that time and there were ten, twenty, thirty, forty, fifty bills pending at any one time that looked at a videocassette and said kids couldn't rent or buy or even see it. And it took one good court case from Missouri to change that: *Webster*.³¹ It seems to be taking a little bit longer with video games because they are the new medium and are a little bit different. I think until legislators become more familiar with video games as a mainstream media, they're still going to be under attack for a little while.

MS. MAYNARD: I think it's certainly our hope, what you suggest, that this will run its course. Right now we have three circuit decisions that are squarely in our favor, rejecting regulation on the basis of content in the Sixth, Seventh, and Eighth Circuits. And then we have a really good decision, a well-reasoned decision, out of the Second Circuit district court, and a Tenth Circuit district court, neither of which were appealed. I'm certain that the Tenth Circuit was appealed and then dismissed. So, I certainly believe that's what should happen, that it should run its course.

MR. LAWRENCE: At some point, the editorial guys turn from: "We need to regulate this bill;" to "We have to stop wasting our public resources nagging on constitutional legislation that's clearly unconstitutional." So, that does change it.

MS. MARKELS: And we will invariably have additional legislation next year. You need to contact your legislators. Many of them were probably sponsors of the statute that passed and sponsors of the bills that were attained in this year. I think it's important for legislators to hear from their constituents, and for the constituents to say: "This is silly." It's something that's great to hear from someone other than an advocate for the industry. That would be great.

AUDIENCE: This is following up on your comment earlier on trends and analysis, where ninety percent of the games are purchased at destination points. Now that technology is changing that, are we going to get more downloads from the Internet or wireless where the parent isn't involved in that kind of thing?

MS. MAYNARD: I think that's an interesting question. I haven't put much thought into it. My off-the-cuff response is that it would probably suffer the same fate as attempts to regulate dial-a-porn and the Internet, to

31. *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir.1992).

the extent that trying to keep those kinds of content just from children would probably prevent content from getting to adults as well, and the Supreme Court has made it clear that that's not viable.

MS. MARKELS: And with respect to children purchasing things on the Internet, the use of credit cards is challenged, which already brings in parental involvement in one shape or form. Maybe an unknowing parental involvement, but mom and dad always find out when the bill comes in.

AUDIENCE: The whole point to this though, the ESRB, the online games, or the rating of the game may be a general argument. The online experience can change it to a mature or any other type of experience. And on this idea, (inaudible) . . . it turns this from more of an idea of speech into an admission ticket for an online amusement park where you can go and participate in these fantasy rides without a real physical consequence. And thinking of this, recently there was a purported amusement park in Vegas where you could hunt down a prostitute with a paintball gun and have sex with her if you could actually get her. And as the theory changes to something like this, where we're selling the public admissions to these online virtual environments, to where it's a new city or a new place with maybe a different type of content, I will support that type of idea.

MS. MAYNARD: Well, as long as what you're talking about is regulating a virtual environment and depictions of anything, you're still talking about speech. And as Judge Posner said, the state can regulate conduct and prohibit actual violence, but regulation of violent images is a new thing. So, in my view, to the extent that what you're still regulating is an entertainment medium and is still pictures and artwork in virtual reality, you're still talking about free speech.

MR. LAWRENCE: As Deanne pointed out, it's pretty clear that simply because there's an entertainment value to it, that doesn't take it outside of the First Amendment. I'm sure you can make arguments that there are a lot of social messages being discussed in the context of a virtual world. In the same way that the Supreme Court recognized the value of the Internet, you could argue that within the context of a virtual world, it creates the possibility of a lot of unique litigation, even with this lack of code of conducts in the virtual world.

MR. LAVERY: I have just a quick follow up to that, so, I'm going to push you a little bit on that. There's been somewhat of a developing economy around some of these multiplayer games where you can buy attributes that you've earned through your many hours and many dollars online. So, browsing through eBay, you find a lot of games from Ultima, or whatever you can buy. So, you've got an actual economy where people sell things back and forth. You have at least some claims, and I don't know whether

you've had successful property based lawsuits against, say, shutting down a game where people have property. Probably, you've been threatened with that. And they say: "We're closing down that game, but we're going to open the next one," and people threaten and say: "Hey, I've paid you \$1,000 dollars over the last two years, including 500 hours of my life, and you can't get rid of my heritage." I just wonder when we're going to get to some point where you might have some regulation on activities online, and I suspect it may come out of the property base. So you couldn't say, well, no theft online. You couldn't say: "Go beat up another character and take away its stuff." Maybe that's a stretch, but I do believe there may be a point where enough of people's waking hours are spent on these things where they look to regulate action as opposed to expression. Does that peak anymore, or do you think it is purely expression?

MR. LAWRENCE: The game operator is running a business, and maybe it'll be whatever public pressure people exert that might undermine the economic value of the game. But I still think it'd be pretty stretched for a legislature to enact a code of conduct for a virtual world. I don't really see that. But, you know, it might be the next big political thing.

AUDIENCE: I just wanted to comment on Gail and ask a question. Every time we have an election or every time a celebrity chooses to show her breast at the Super Bowl, the media is attacked. But as a business, I don't really know that we're doing quite enough to not make ourselves this target. I can't remember the last time I walked in a video game store where there was an M-rated game running with a kid playing it. If the video staff is confronted, then they take it right out and they say it was a mistake. And granted, there's more violence on the streets than there are in the games, but still, they're certainly running it. So, my question for Gail is whether we are expecting the financial pressures to regulate the retail industry.

MS. MARKELS: We don't control retailers. We work with retailers, we beg, we plead, we sit down with the retailers: "Testify with us." I think retailers understand that it's in their best interest to behave in ways that don't offend their community. With respect to playing M-rated demos, I would hope that a retailer would know what the demographics are. If you're in a mall-based store where kids are infrequent visitors, it might be different. I don't think you'd see *Vice City* being demoed at Toys-R-Us.

AUDIENCE: The question is, will we actually penalize that? When a game like *Vice City* comes out, Wal-Mart will carry it because Wal-Mart knows they will sell the game and make money. And they'll also sell it to under-aged people as will others. Will we penalize them and possibly use those penalties to fund the efforts of groups like ESRB?

MS. MARKELS: Retailers are not our members and we urge retail-

ers to voluntarily enforce the rating system the same way theater owners enforce the rating system. We think that there's been increased enforcement. Retailers have adopted policies where they've agreed to enforce the system. You know, as a trade association representing the publishing community, we don't have the power to do that. We do have an open dialogue with the retail community to encourage them to do something. Retailers have become increasingly responsive, I think. But it's hard, as you know. We have hundreds of retail establishments, and there may be a national policy.

Policies aren't always followed through at the local level, and we can all make better efforts to enforce ratings. We think enforcing ratings is critical and we work with retailers quite a bit to encourage them to do that. But that's a good point. Our weakest link clearly is the area of retail enforcement. That's an area where we need to work quite hard. We continue to focus more attention on that. Because unless we do, unless there's a perception that our retailers are good corporate citizens, we're going to have problems up and down the line. You can always argue the First Amendment, but to be honest with you, legislators really don't care about the First Amendment. The better argument when we deal with legislation is that as an industry we're responsible and that we're regulating ourselves, therefore government intervention is not necessary. And by the way, it raises serious constitutional problems when you try to keep legislating in this area. The most important argument we can make is we're taking care of the issue ourselves.

MS. MAYNARD: And despite what the experience may be in your community, isn't it true, Gail, that the enforcement at the retailer level of video games is approaching, if not equal to, the enforcement now at movie theaters, which is considered the gold standard in terms of retail enforcement?

MS. MARKELS: And yet even movies, which are the gold standard, don't have enforcement one hundred percent of the time. Our enforcement is improving. It's not quite as good as the motion picture industry and needs to get there. But as an industry, we're ten years old. Movies are, I don't know, forty, fifty, sixty years old. They have a longer history. Their rating system is far older than ours. Can we grow, can we do a better job? Absolutely. Will we do a better job? Yes, we will.

AUDIENCE: When you talk about how movies were originally from (inaudible) . . . and now video games are going through the same struggle. Personally, I think that the ongoing massive media games are going to be the next area of scrutiny. Do you see anything out there beyond what we are seeing? Is there going to be some new technology emerging that will

just keep the rating cycle going?

MR. LAWRENCE: If there was, I'd patent it.

MS. MAYNARD: Right. That's good business for Paul and me. I think this is actually a better question for Gail. There are current efforts of the type that you suggest. I don't know if you remember, there was a great Tiger Woods public service announcement explaining the rating system, but Gail knows more about the details of those efforts than I do.

MS. MARKELS: Sure, we have a whole educational effort underway. It's called "check the rating."

We work very closely with retailers to make sure at point of sale that there are materials up, that there are all kinds of materials on the shelves, posters, whatever works with the retailers to educate consumers. And we've reached out to government; we've reach out to associations that represent pediatricians. We've got to get the message out. It's really to our advantage, and we believe that. We have statements that we give running all over the country. We're working with the magazines that have been placed inside retail establishments about the rating system. We're open to different ideas, because we think that parental education and empowerment is critical. And on the other hand, we can't make parents do the job that they don't want to do or don't care to do. And I think most parents are responsible. Some may not have the time, and we have information and materials that we send out. We think that our rating system, which has been called the best in the country, works. And we've undertaken many, many efforts. I know that we're running out of time, but I'd be happy to talk to you afterwards a little bit more about what we're doing. But I take your point. Parental education is critical. If you have any ideas, I'd love to hear them from you.

MR. ROHDE: In terms of our timing here, we have actually allocated a little more time after the break to continue this exciting topic. And I realize that although we may have a single minded panel up here in many respects in terms of the free speech issues, I'm sure we have a very diverse audience in front of us with other opinions and perspectives as well. And so, over the break, I'd ask you to sort of give it some thought. And don't be bashful about asking some of the hard questions to this group, because obviously this is an important subject. It is important not only for the legal community, but also for our society as we see this non-aggressive conflict arising in the courts as the trend emerges to regulate an area which the courts are stepping into. So, I would invite some of the tough questions that may come out of the audience and we'll try to come up with answers. We'll spend a little more time after the break on this topic and then we'll move into a more business-oriented part of our program, talking about

money. You know, where does the money come from to develop all these games? And how do you go about financing and funding game development and realizing how it fits into our economy? So I want to take about a fifteen-minute break, and we can pick up here again at, say, 10:35. Thank you very much.

(BREAK)

MR. ROHDE: Following the last question we had just before the break, with regard to what the organizations are doing these days in terms of ad campaigns. Gail will have some additional information on that. And then secondly we'd like to get out on the table some of the court issues we're dealing with. So I'll turn it back over to Gail.

MS. MARKELS: Thanks. Just very briefly, in response to the question about advertising campaigns, we already have PSA TV spots, and from October of 2003 to January 2004 there've been 59.1 million audience impressions, and growing. We have PSAs that are in consumer print media, and again, from October 2003 to April of 2004 there've been 21.8 million consumer impressions. We also created, through game enthusiast magazines between October 2003 and June 2004, 6.1 million consumer impressions. And also, with respect to the online arena, we have PSAs, banner ads, and pay-to-play that add on to them. So we are making efforts, and we could do more, of course. Will we do more? Yes, absolutely. But I think that that's a good point.

MS. MAYNARD: And one of the other topics that I had mentioned at the very beginning, but then we never discussed specifically, was the various tort suits that the industry and other media companies have faced after some of the school shootings and other shooting incidents. And they present the somewhat different legal issues, in addition to raising all the same First Amendment concerns that we discussed earlier. It's clear that tort liability presents the same First Amendment problems as legislation. *New York Times v. Sullivan*³² makes clear that using the government's judicial system to impose civil liability on another party triggers First Amendment scrutiny as well. And there have been two cases which we've litigated: the case after the Paducah School shooting,³³ and the case after Columbine.³⁴ Both were virtually identical complaints that raised both state law tort claims as well as strict product liability claims. And then there was a case against Midway in the Second Circuit, I think involving *Mortal Kombat*, where a child allegedly copied [the game]. And then more

32. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

33. *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002).

34. *See Sanders v. Acclaim Entertainment, Inc.*, 188 F.Supp.2d 1264 (D. Colo. 2002).

recently, a tort suit in Tennessee that was brought after some teenagers shot people who were driving down the highway, and there was a tort suit brought against Rockstar Games, Take-Two Interactive over those incidents.

We've successfully defended against tort suits in *James* and *Sanders*, raising principles that you all remember from first year torts; duty principles, principles of superseding cause and proximate cause issues. Essentially, both of those cases were dismissed on the theory that there was no legal duty running from the media companies to the victims. And in addition, the intervening intentional criminal act of the shooters cut off any proximate cause. Judge Boggs in the Eighth Circuit has this long discussion of *Palsgraff*.³⁵ I'm sure everyone remembers the woman on the train platform from first year. And the strict liability claims fail because really, the strict products liability is not implicated by suits that try to bring claims based on the message, or the idea, or themes, or contents of a product.

So it's not that I'm banging Paul over the head with the book. The message is in the book, and so, of course, I dismiss those claims on the ground that the injury was not from that "product." And so the status of the Tennessee suit was the most recent. The others all resulted in published opinions rejecting the claims. And actually the plaintiffs sought *cert.* from the Paducah, Kentucky case, which was denied. And my understanding of the status of the Tennessee suit is that the defendants removed it to federal court, and it was removed into the same circuit as the *James* case; the district court in the Sixth Circuit, and it was then voluntarily dismissed by the plaintiffs. And then more recently, similar claims were brought against the makers of *Grand Theft Auto* by people in the Haitian community in Florida. And First Amendment defenses were raised to that suit as well. And on the date that the plaintiff's response to the motion to dismiss was due, they voluntarily dismissed that suit.

MS. MARKELS: At the state level and local level last year we did see one bill in New York City that would have established a cause of action against video game makers, retailers, publishers and advertisers, if the victim of a crime could demonstrate a link between someone playing the game and their injury. New York City let that bill die. It failed to pass, and five new bills have been introduced, but civil liability is not part of any of those.

MS. MAYNARD: As a side note I should say too that these cases were all dismissed on a motion to dismiss, so the facts were never developed. But Michael Carneal, who was the shooter in the school incident in Paducah, gave an interview from prison. He was convicted primarily for

35. *Palsgraf v. Long Island Railway Co.*, 162 N.E. 99 (N.Y. 1928).

his acts, or he was found not guilty by reason of insanity, I can't remember. Anyway, he's in prison and gave an interview where he said that the allegations that video games had anything to do with his actions were laughable.

MR. LAVERY: And can I just mention one more thing and then we can go to questions. So there's a fellow down in Florida. Kind of a sort of activist, but I understand he's been involved in these Fort Lauderdale cases. I can't remember his name. I understand he was somehow involved in those court cases. And after the fact, I do know from a couple of game developers, that he's taken to sending letters out to game developers to try to overcome the proximate cause issue by sending them long letters about how, see, here was another event and those kids played your game as reported in the paper, and so it's foreseeable that your games caused this, and so it kind of tried to set up the foreseeability on the next round. I don't know, is there any kind of either good or bad legal organizing to try and make these suits more likely in the future?

MS. MAYNARD: My personal view is that misunderstands the basis for those decisions. I think the Eighth Circuit put it really well when it said, at least under Kentucky law, that ultimately at bottom, whether one has a legal duty is a legal question, not a factual question. It's a policy question. And are we going to hold media speakers liable for actions that are supposedly caused by someone who hears their speech and then goes out and does something? And the line that I was quoting from the district court in the Paducah case I think amply shows why that would be a grave mistake. I mean, if you think about it and you apply it, what are the types of speech that people have supposedly taken action based upon? It would include things like the Bible.

AUDIENCE: What about, then again, not just the media, but also the medium?

MS. MAYNARD: He's asking: "What about the fact that if you restrict games you're cutting off creative outlet?" If I understand your point, we have made precisely that point in the litigations, which is that the whole process of developing a game is a huge creative process, and that's akin to those who are making other forms of speech. And some of the affidavits that we've submitted, including one from a game developer here in Washington, have been quite eloquent about the nature of the speech that's involved in creating the game, and the kind of creativity that goes into it. Is that what you mean?

AUDIENCE: Well, actually it's more from the consumer's end, making modifications to the game, creating events entirely different from the toolset they bought that came with the game. And then also filming what is essentially a movie from a game, like *Quake III*.

MS. MAYNARD: And your point would be that if you were able to curb the initial speech, then you're also going to curb these secondary speeches. Yes. And with those issues raised, there are probably better qualified IP lawyers in here. And those type of secondary works create all kinds of derivative IP issues. But that's not our panel.

AUDIENCE: For most of us who represent game developers, and given the game development climate, can you make suggestions. Is there any kind of guidance or warnings for comfort that we can give them in their process, other than "don't release it during election years?"

MR. LAWRENCE: I think you heard, it's been a fairly consistent result from the courts, and not to suggest that it shouldn't be a worry. I think we've got to follow the trends in the courts, and so far it's been very successful. And given the doctrine, I'm not sure if there's any reason to be overly concerned about it. The flipside of what you're saying is the fact that the reason why a lot of these laws are struck down is because they chill expression and people would then try to limit what they've created. And the response would be that there's a violation of the First Amendment. So if that's happening, it's sort of the proof of the point for the person that's being violent.

AUDIENCE: What about the one case in which the judge sort of mentioned that fighting words may be a valid argument? Want to maybe play the devil's advocate and lay out what the fighting words argument would be and then discuss why it wouldn't work?

MS. MARKELS: Just tell him why it wouldn't work.

MR. LAWRENCE: I promised him that I wouldn't do anything like that, argue a point of view. It's hard for me to imagine it, but I will just suggest. I would guess that an argument would be taking something like *Postal* and the fighting words exception, as with obscenity, is, in my mind to some degree, it's hard to express doctrinally why it even exists. And so if you want to get behind it at some point, and I think what Judge Lasnik was saying is that: "I can concede looking at whether it's *Postal 2* or another a game and saying this is so sort of like pornography. This is so far out there that it's not protected speech." I would assume that the argument will be something along those lines. That *Postal 2* is simply just a fight. I don't know that game so I can't really speak to it. But there will be a game and there's no plot. It's simply incident after incident of just shooting people, shooting people, shooting people, in an extreme and violent way such that it is too provocative or something. It's hard to imagine, but it has got to be just sort of shocking to the conscious kind of response. But that's the best I can come up with. I don't think anyone's going to make that argument, but if they did—

AUDIENCE: Wouldn't it be a game that would have like some sort of hate towards a certain group or something and advocate that, and then show the violence and provide instruction.

MR. LAWRENCE: That's a whole—I mean, *Chaplinsky's* not about hate speech.³⁶ It's about a specifically directed threat against a specific person. It's really closer to the imminent, the *Brandenburg* cases³⁷ where you are saying something directly to that person in such a way as likely to result in a fight. It's hard to see how that would apply directly to video.

MS. MAYNARD: And that's why it doesn't apply, what he just explained. It means the doctrine just simply doesn't apply to a medium, or what you're complaining about is the effects of and opportunity for intermediation of fault and other forces in your life to play on your attitudes and behavior. It's not the kind of thing where Paul says something to me and I kind of pop him. What they're claiming is what Judge Boggs says, is that video games and watching this media has an effect over this long period of time on your personality development and how you feel about things. People object to some of the speech in games, and frankly in lots of other media, that contains messages with which they disapprove, or of which there's case after case of speech where you read and you might say: "Well, that offends me," or, "I don't like that speech." But the courts have made very clear in the Ninth Circuit in that case called *Dworkin*,³⁸ in the speech that I, and lots of people, would find personally abhorrent, that offensiveness is not a ground to regulate speech. And what I would say is, it's precisely any instances where we disagree with the message and the speech where we ought to be the most careful about allowing government to regulate it. And it's why most of the prominent First Amendment precedents happen to be speech that's kind of on the margin. But it's protecting that speech that protects all the other speech that we have, and it's where courts ought to be the most careful not to let their own personal prejudices chip away at the First Amendment.

AUDIENCE: Any "devil made me do it" arguments from end users?

MS. MARKELS: I haven't really seen a lot of the Twinkie defense. But I think the courts have been not very welcoming of that kind of claim. But I'm sure we're going to see it. The same way it happened in television and movies, I'm sure we're going to see it in video games. It just sometimes happens ten or twenty years later. So we probably have some time with respect to that.

36. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

37. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

38. *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188 (9th Cir. 1989).

AUDIENCE: Does the multiplayer aspect of gaming have any effect on the analysis?

MS. MAYNARD: He's asking whether the multiplayer aspect will change it. And this is the question I was asked here earlier. In my view, no. If anything, it enhances the claim that it's speech because you and I are interacting in this world together and we are having an online debate. It's akin to the kind of communication that occurs on the Internet, but we're just having this debate in a fantasy world. That's the thing that gets lost in these debates. If your character interacts with my character, we're still talking about an illustration interacting with another illustration, and so it's inherently speech in my view. There's no actual violence going on.

MR. LAWRENCE: I agree, but I'm trying to think of situations where we're going to push this. For example, in an online world if someone were to burn a cross—and you know there was the U.S. district court that allowed criminal prosecution for burning a cross. The reason why that was upheld is because of there being this direct intimidation aspect to it. And I guess I could see someone arguing that that wouldn't be lost, even in an online world. So maybe that's the extreme that's out there in the online world. But again, that's criminal conduct, and I don't know, could there be criminal prosecution for conduct in an online world? I'm sure someday that case will be out there.

AUDIENCE: What about regulation of the video game industry in foreign countries?

MS. MAYNARD: Yeah, regulation outside the United States. Is anybody following that?

MS. MARKELS: There has been, I believe, some regulation, but that's not something I follow as closely.

MR. LAWRENCE: I can comment just on a couple of countries. Germany, for example, has more extensive regulations on expression, and in fact has a board that oversees computer game publication.

MS. MARKELS: As they do, in fact, with motion pictures and videocassettes. The United States is the only country in the world with a First Amendment. Our protections are far broader than any place in the world: in Canada, Australia, Germany, all countries that are known for being democracies, have very strong restrictions on speech, much stronger than the United States.

MR. LAVERY: So just a couple of side notes to maybe provoke some conversation out of it. One, the U.S. is the most liberal and is also the biggest market for games. And so an interesting question exists of whether game developers, to an extent, develop for the least common denominator of where they might be regulated. And I would say from what

I've seen in the packaged markets where people are just single players and buy it in a local store and play it at home, there tends to be localizations for the more restrictive countries, but the more liberal content is the main version and it gets sent to the U.S. With online games, I don't have as much experience, and I wonder whether a company that was doing specifically only online games targeting a bunch of countries would start developing for kind of the place where they might have the most exposure. To me that's an interesting question I don't know the answer to.

AUDIENCE: With the online communities there are also online chats. What about an instance where some person managed to get his online character to rape other online characters in a virtual environment and timing with online chats? Besides violating terms of service or terms of use of the online environment, what sort of a pressure may be put onto there, or how would governments respond to someone like that timing online chats with child pornography?

MR. LAWRENCE: There's a lot of stuff in there. I guess on one level, obviously the Internet and online communities do present issues in terms of, for example, access, in terms of people that might then result in improper contacts in terms of child pornography and that kind of thing. But ultimately it's that contact. It's the real-world conduct that the government criminalizes. So the notion that your conduct online in and of itself ultimately is the basis for prosecution seems like a big stretch to me. People do sting operations where they can set up the meeting online, but it's then when the guy goes to meet an underage person and ends up meeting with the cops that he gets arrested. It's not simply for having communication with a minor.

AUDIENCE: It seems to me that the bulk of the concern that you guys direct towards us is that it's not going to happen in a criminal sense. And to me some of the retort questions, something the gentleman there brought up, simply a property question might evolve from that scenario. I relate it to something like baseball where baseball is an entertainment venue. They sell you the entertainment of baseball. All of a sudden two guys end up arguing over who has the property expectation of who owns the baseball that is now worth a couple of million dollars, and the judge rules that you guys each have a share of property expectation in this. We have this in online games. Sellable attribute, sellable products. A popular game, for instance, where there's a ranking system and you want one of those ranked people to come play on your team and beat other people so your ranking goes up. There's definitely some property interest coming out of here and where does the law see this going? Have you guys identified a direction that this is traveling?

MS. MAYNARD: I haven't seen any cases to address those specific questions, and it will raise some interesting questions vis-à-vis intersection of generally applicable court principles with the First Amendment and how we're going to play that out.

AUDIENCE: I think one of the things that's happened is that some of these gaming companies just have decided they don't want that kind of stuff going on, and so for the black market they're trading in characters and whatnot. They just say that as a matter of contract law that these are the rules of the road. If you want to play our game, you can't do this stuff, and if you plan on doing it, you're gone. So much of this stuff seems to be handled simply by companies being smart and self-regulated and doing these contracts rather than the government having to step in and do it. But they really can't do anything to try to regulate the content.

MR. LAVERY: Two thoughts about that. One is that there are some companies that decide that as a business model they think they'll be most successful by opening it up as opposed to turning it down. So you think about *Magic: The Gathering Online* where they really want this secondary market, and they think that that's what's really going to attract people to their game. And so when you have that, you're right. There's a property interest just created by contract to date. But if you have something like that proliferating enough, will there be a point where legislators get interested in protecting that whole general scheme of online rights? I don't know. It would have to be pervasive enough and generic enough, and there would have to be enough common interest across the different sets of contract rights for that to be a trend.

MR. LAWRENCE: Any other questions?

AUDIENCE: Has anyone tried to bring an intentional infliction of emotional distress or negligent infliction of emotional distress claim that you guys know of? I mean, that *Postal* game, I can see being somewhat distressing to some people.

MS. MAYNARD: There may be a similar claim. There were claims of that like in the Haitians' suit that was originally brought but then involuntarily dismissed. But those types of claims trigger the same kind of First Amendment protection. You all remember the Jerry Falwell cases, the classic situation where that was when he brought a claim for intentional infliction of emotional distress against Hustler.³⁹

AUDIENCE: There is a lot of educational software in grade schools. Has there been any activity in people bringing suit or legislation regarding certain things appearing in the grade schools, particularly games that quote

39. *Hustler v. Falwell*, 485 U.S. 46 (1988).

the scriptures or the Bible?

MS. MAYNARD: I haven't seen that. Gail would be the one who would have known. She has the most knowledge of all the different bills.

MR. LAWRENCE: Now you're getting to church/state issues. Any time that a school district would attempt to adopt a curriculum that's going to basically impose some doctrine within the context of science teaching for example, you've got a lawsuit. I'll tell you, the ACLU is going to be there and they're going to sue.

AUDIENCE: And the analysis will be substantially similar?

MR. LAWRENCE: Yeah, I don't think it would relate at all to the video game aspect of it. It would be a traditional analysis of the church/state doctrine.

MR. LAVERY: Thanks very much.

MS. MAYNARD: Thank you.